

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| <b>Coordination Proceeding Special Title<br/>(Rule 1550(b)) MARRIAGE CASES</b> | <b>No.</b>   |
| <b>CITY AND COUNTY OF SAN FRANCISCO,<br/>a charter city and county,</b>        | Judicial Council Coordination<br>Proceeding No. 4365 |
| <b>Respondent,</b>   | First Appellate District,                            |
| <b>v.</b>  | Division 3, Case No. A110449                         |
| <b>STATE OF CALIFORNIA, et al.,</b>  |  |
| <b>Appellants.</b>   |  |

San Francisco County Superior Court Case No. 429-539  
(Consolidated with *Woo v. Lockyer*, Case No. 504-038)  
The Honorable Richard A. Kramer

**PETITION TO TRANSFER APPEALS**

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The constitutionality of laws barring same-sex marriage has been the subject of litigation and debate throughout our nation. Direction from this Court is essential to resolve this issue in California. This Court should therefore exercise its authority pursuant to Article VI, section 12(a) of the California Constitution and Rule 29.9 of the California Rules of Court to grant the petition to transfer this matter<sup>1/</sup> to itself from the California Court of Appeal for the First Appellate District in order to resolve the following issue presented:

### **ISSUE PRESENTED**

Where California law provides that registered domestic partners shall have the same rights, protections and benefits as spouses, while at the same time preserving the common understanding of marriage as a union between a man and a woman, does this legislative balance deprive same-sex couples of fundamental rights or otherwise discriminate on the basis of gender or sexual orientation in violation of the California Constitution?

### **INTRODUCTION**

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1. The State Appellants are also filing petitions identical to this one in the three other cases, listed in footnote 2, in which they are parties.

In *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, this Court reserved the issue of whether California's marriage laws are constitutional. *Lockyer* was not about morality, commitment, religion, parenthood or sexual orientation. Instead, it concerned the proper role and function of government in our constitutional system.

The instant appeals similarly focus on discrete legal issues. These appeals are not about whether same-sex couples are entitled to recognition and respect. And they are not about whether same-sex couples have formed committed, loving relationships. In California, these questions have already been answered. California is the only state in the nation to legislate, without judicial compulsion, that registered domestic partners shall have the "same rights, protections, and benefits" as spouses. California is dedicated to providing equal rights and benefits to same-sex couples.

Instead, these appeals present the question of whether, under our constitutional system, it is legitimate and rational for the legislative process, including both the Legislature and the People of California, to determine that there continues to be value in maintaining the commonly understood definition of marriage, which has deep historical roots, while at the same time declaring that registered domestic partners shall have the same rights, protections, and benefits as spouses. We submit that it is.

The Superior Court, however, ruled that California Family Code sections 300 and 308.5 violate the equal protection clause of the California Constitution. Appeals from those judgments are now pending before the

California Court of Appeal for the First Appellate District.<sup>2/</sup>

Appellants State of California, Governor Arnold Schwarzenegger, Attorney General Bill Lockyer and State Registrar of Vital Statistics Michael Rodrian (collectively the “State Appellants”), respectfully request that this Court transfer the appeals of the coordinated marriage cases to itself for decision. These cases present issues of great public importance that require prompt resolution by this Court. The State Registrar is now subject to writs and judgments, stayed pending appeal, that direct him to enforce the marriage statutes in a gender-neutral manner and to take steps to procure uniform enforcement of the statutes by local officials throughout the State.

Thus, in essence, the trial court did not simply strike down California’s marriage statutes. Rather, it effectively redefined marriage

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2. The State Appellants have filed notices of appeal to the First Appellate District in four cases: *City and County of San Francisco v. State of California, et al.*, S.F. Superior Ct. Case No. CGC-04-429539, First Dist. Ct. of App. Case No. A110499 (the *CCSF* action); *Lancy Woo, et al. v. Bill Lockyer, et al.*, S.F. Superior Ct. Case No. CGC-04-504038, First. Dist. Ct. of App. Case No. A110451 (the *Woo* action); *Tyler, et al. v. County of Los Angeles, et al.*, L.A. Superior Ct. Case No. BS 088 506, First Dist. Case No. A110450 (the *Tyler* action) and *Clinton, et al. v. State of California, et al.*, S.F. Superior Ct. Case No. CGC-04-429548, First App. Dist. Case No. A110463 (the *Clinton* action). These cases were four of the six cases coordinated before Judge Richard A. Kramer as the *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365. The State of California and its officials are not parties to the two remaining cases. The plaintiffs in those two cases, *Thomasson v. Newsom*, S.F. Superior Ct. Case No. CGC-04-428794, (the *Thomasson* action), and *Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco*, S.F. Superior Court Case No. CGC-04-503943, (the *Fund* action), have filed notices of appeal. The First Appellate District has not yet opened case numbers for the *Thomasson* and *Fund* appeals.

without giving the Legislature an opportunity to act. This is quite different from the approach taken in other state courts where marriage is defined by statute. Even in states where their marriage laws were declared unlawful because, unlike in California, they failed to afford rights and benefits to same-sex couples, the state courts were nonetheless deferential to the separation of powers and gave their legislatures the opportunity to address the identified legal infirmities. (See, e.g., *Baker v. State of Vermont* (Vt. 1999) 170 Vt. 194, 226 [744 A.2d 864, 887].)

Of course, Massachusetts is different from those other states because in Massachusetts, the definition of marriage is based in the common law, not in statute. (*Goodridge v. Department of Pub. Health* (Mass. 2003) 440 Mass. 309, 319 [798 N.E.2d 941, 952-953].) Accordingly, the Massachusetts Supreme Judicial Court had the jurisdictional authority to redefine the common law definition of marriage. (*Goodridge v. Department of Pub. Health*, supra, 798 N.E.2d at p. 969.) Unlike Massachusetts, California's definition of marriage is defined by statute.

Throughout California history, marriage has been defined by statute as a union between a man and a woman. Notwithstanding that history, California has acted aggressively to ensure that domestic partners receive substantially the same rights and benefits as married spouses. The trial court's writs and judgments, if upheld, would amount to a landmark redrafting of our State's marriage laws.

The instant appeals are of such public importance that they must be promptly decided by California's highest court. Review by the Court of Appeal will necessarily and substantially extend the uncertainty regarding

whether California's marriage laws are constitutional. Same-sex couples should be given a prompt determination as to whether they can marry, and should not have to put their lives and affairs on hold indefinitely while this matter works its way through several levels of court proceedings. In addition, federal, state and local public officials should be given prompt clarification of their duties and responsibilities under California's marriage laws. And one federal court has temporarily abstained from addressing the constitutionality of California's marriage laws pending resolution by the California courts.

Taking these appeals now would also give this Court an opportunity to determine whether Proposition 22's limitation on marriages applies both to marriages entered into in California, and also to marriages entered into pursuant to the laws of other jurisdictions - an issue upon which two Courts of Appeal have recently taken differing positions.

Based on the totality of the circumstances, the State Appellants respectfully request that this Court exercise its authority under Article VI, section 12, subdivision (a) of the California Constitution and Rule of Court 29.9 to transfer the instant appeals to itself for decision.

## STATEMENT OF THE CASE

### A. Procedural Background of the Coordinated Marriage Cases.

On February 10, 2004, San Francisco Mayor Gavin Newsom directed the San Francisco County Clerk to begin altering the official marriage forms and documents used to apply for and issue marriage licenses so that same-sex couples could be married. (*Lockyer v. City and County of San Francisco*, supra, 33 Cal. 4th at p. 1070.) The County Clerk altered the forms and began marrying same-sex couples two days later. (*Id.*, at pp. 1070-1071.) The next day, the *Thomasson* and *Fund* plaintiffs filed papers asking the San Francisco Superior Court to halt the marriages; those requests were denied. (*Id.*, at p. 1071 & fn. 6.) Shortly thereafter, the Attorney General filed an original petition for writ of mandate, prohibition, certiorari or other relief in this Court. (*Id.*, at 1072.) The petition requested an immediate stay of the marriages and a stay of the *Thomasson* and *Fund* trial court proceedings. (*Ibid.*)

On March 11, 2004, this Court issued an order directing San Francisco officials to show cause why a writ of mandate should not issue “requiring the officials to apply and abide by the current California marriage statutes in the absence of a judicial determination that the statutory provisions are unconstitutional.” (*Id.*, at p. 1073.) Pending a determination on that question, this Court directed San Francisco officials to comply with California’s marriage statutes, an order that halted further same-sex marriages in California. (*Ibid.*) The Supreme Court also stayed the *Thomasson* and *Fund* actions, while specifying that “the stay ‘does not

preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes.’’<sup>3/</sup> (*Id.*, at pp. 1073-1074.)

San Francisco responded to the Supreme Court’s March 11, 2004 order by filing the *CCSF* action in the San Francisco Superior Court that same day.<sup>4/</sup> The *Woo* and *Tyler* actions were commenced soon after.<sup>5/</sup> Those actions all challenged the constitutionality of California’s marriage statutes.

The Judicial Council ordered the *CCSF*, *Woo*, *Tyler*, *Thomasson*, and *Fund* actions coordinated, and assigned the Honorable Richard A. Kramer to preside over the cases, now collectively known as the *Marriage Cases*, Judicial Council Coordination Proceeding No. 4365.<sup>6/</sup>

On August 12, 2004, this Court issued its decision in *Lockyer v. City and County of San Francisco*, supra, 33 Cal. 4th 1055. This Court held that the San Francisco officials exceeded their authority in determining that restrictions in the marriage statutes barring same-sex marriage were

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3. The *Thomasson* and *Fund* cases were ultimately decided as part of the *Marriage Cases*.

4. See *City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1034, *pet. for review pending* S134515 (Jun. 7, 2005).

5. Proposition 22 Legal Defense and Education Fund attempted unsuccessfully to intervene in the *CCSF* and *Woo* actions. (*City and County of San Francisco v. State of California*, supra, 128 Cal.App.4th 1030, 1034-1035, *pet. for review pending* S134515 (Jun. 7, 2005).) The State Appellants took no position on intervention and did not participate in the appeal.

6. The *Clinton* action was later added to the coordinated proceeding.

unconstitutional before adjudication of the statutes by a state court. (*Id.*, at p. 1069.) This Court stated:

If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed that the state's current marriage statutes are unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised that couple to challenge the denial in superior court. That procedure - a lawsuit brought by a couple who have been denied a marriage license under existing statutes - is the procedure that was utilized to challenge the constitutionality of California's antimiscegenation statute in *Perez v. Sharp* (1948) 32 Cal.2d 711, 198 P.2d 17, and the procedure apparently utilized in all of the other same-sex marriage cases that have been litigated recently in other states.

(*Id.*, at p. 1099.) This Court further held that the approximately 4,000 same-sex marriages authorized by San Francisco therefore “must be considered void and of no legal effect from their inception.” (*Id.*, at p. 1113.) Issuance of the decision also had the effect of dissolving the stay of the *Thomasson* and *Fund* actions in the trial court. (See Supreme Court Minutes, Sept. 15, 2004 (Minute Order in *Lockyer v. City and County of San Francisco*, Supreme Ct. Case No. S122923.)

In December 2004, the trial court held simultaneous hearings in the six *Marriage Cases*. The *CCSF*, *Woo*, *Tyler* and *Clinton* hearings were writ of mandate hearings under Code of Civil Procedure section 1094. (See Exh. 1 hereto (Final Decision On Applications For Writ Of Mandate, Motions For Summary Judgment, And Motion For Judgment On The

Pleadings, dated Apr. 13, 2005 (“Final Decision”)), pp. 2-3.) In the *Fund* and *Thomasson* actions, the trial court heard cross-motions for summary judgment and for judgment on the pleadings. (*Id.*, p. 2.)

**B. The Trial Court’s Judgment in the Marriage Cases.**

The trial court issued its final decision in the *Marriage Cases* on April 13, 2005. (Exh. 1, Final Decision.) The trial court ruled that Family Code sections 300 and 308.5 discriminated on the basis of gender, and therefore a strict scrutiny level of review applied. (*Id.*, at pp. 5, 17-19.) The court also found that the strict scrutiny test applied “because Family Code sections 300 and 308.5 implicate the basic human right to marry a person of one’s choice.” (*Id.*, at p. 21.) In the alternative, the trial court concluded that, even if the rational basis test were to apply, the statutes would still be considered unconstitutional because “the challengers to Family Code sections 300 and 308.5 have met their burden of demonstrating that those sections do not rationally relate to a legitimate state purpose.” (*Id.*, at pp. 5-6.)

Since the marriage statutes failed the rational basis test, assuming that it applied, the trial court reasoned that “[i]t is axiomatic that such rationales could not therefore constitute a compelling state interest.” (*Id.*, at p. 21.) Nonetheless, the trial court also ruled that the rationales for the marriage statutes offered by the State Defendants and the plaintiffs in the *Thomasson* and *Fund* actions did not constitute a compelling state interest needed to satisfy the strict scrutiny test. (*Id.*, at pp. 22-23.)

Based upon the trial court’s final ruling, it issued identical, separate judgments in the *CCSF*, *Woo*, *Tyler* and *Clinton* cases. The judgments declared unconstitutional Family Code sections 300 and 308.5.

They further directed the issuance of writs of mandate requiring the State Registrar of Vital Statistics (a) to furnish the forms necessary to allow for marriage between persons in a gender-neutral manner (*i.e.*, without regard to the gender of the persons getting married), (b) to furnish instructions to local county clerks and registrars informing them of their obligation to issue and record marriage licenses and to perform marriage ceremonies in a gender-neutral manner, and (c) to implement and enforce “all duties with respect to marriage” in a gender-neutral manner. In the *Thomasson* and *Fund* cases, the trial court entered judgment for the defendants and intervenor-defendants and against the plaintiffs. (Exhs. G, H (Judgments in *Thomasson* and *Fund*, dated Apr. 14, 2005.) All of these judgments were stayed pending appeal.<sup>7/</sup>

On May 31, 2005, the State Defendants filed their notices of appeal from the judgments in *CCSF*, *Woo*, *Tyler* and *Clinton*. The *Fund* plaintiff filed its notice of appeal on June 9, 2005, and the *Thomasson* plaintiff filed his notice of appeal on June 10, 2005.

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7. The United States District Court for the Central District of California has likewise stayed a challenge to California’s marriage statutes under the United States Constitution pending a decision by California courts. In a published decision in *Smelt v. County of Orange* (Jun. 16, 2005), \_\_\_ F.Supp.2d \_\_\_, 2005 WL 1429918, U.S. District Judge Gary L. Taylor granted the motion for abstention pursuant to *Railroad Commission of Texas v. Pullman Co.* (1941) 312 U.S. 496, that was filed by defendants California Department of Health Services and State Registrar of Vital Statistics Michael Rodrian. The decision stated: “In order to give California courts the first opportunity to evaluate the constitutionality of California statutes under the California constitution, this Court will exercise its discretion to abstain for now from deciding whether the state statutes violate the federal Constitution.” (*Smelt v. County of Orange*, *supra*, 2005 WL 142918, at p. \*5)

## REASONS FOR GRANTING THE PETITION

### I.

#### **THE SAME-SEX MARRIAGE CASES PRESENT AN ISSUE OF GREAT PUBLIC IMPORTANCE THAT THE SUPREME COURT SHOULD PROMPTLY RESOLVE BY TRANSFERRING THE APPEALS TO ITSELF.**

The California Constitution vests this Court with authority to transfer to itself any appeal pending in the Court of Appeal. (Cal. Const., art. VI, § 12, subd. (a).) Rule 29.9(c) of California Rules of Court provides that a case must “present[] an issue of great public importance that the Supreme Court must promptly resolve” in order to qualify for transfer to the Supreme Court. (Cal. Rules of Court, rule 29.9(c).) This Court has transferred cases to itself in the past where “it is uniformly agreed that the issues are of great public importance and should be resolved promptly.” (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 [appeal in challenge to “Victims’ Bill of Rights” initiative transferred to Supreme Court]; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 240 [appeal in challenge to regulations adopted by Insurance Commission to implement Proposition 103 transferred to Supreme Court].)

The appeals of the constitutional challenge to California’s marriage laws should be transferred to the Supreme Court because they indisputably involve matters of great public importance. Although only one state, Massachusetts, presently issues marriage licenses to same-sex couples, the issue has been the subject of intense, nationwide litigation over the past few years, and the issue has garnered international attention. In

addition, eleven states amended their constitutions during the November 2004 elections to bar same-sex marriage, and proposed initiatives have been presented to the Attorney General on this topic.<sup>8/</sup> Moreover, the California Legislature has thus far rejected bills legalizing same-sex marriage and amending the Constitution to forbid it.<sup>9/</sup> Simply stated, same-sex marriage is a matter of statewide and national interest.

The question of whether California's statutes are constitutional requires prompt resolution because of the large number of Californians who await the final outcome of these appeals. The urgency of the current situation is in some ways comparable to the situation that led this Court to exercise its original jurisdiction over the petition in *Lockyer v. City and County of San Francisco*. In the earlier case, this Court took quick action to halt the unauthorized marriages and to nullify the already-performed marriages in order to remedy the potential legal uncertainties involved.

(*Lockyer v. City and County of San Francisco*, supra, 33 Cal.4th at 1117.)

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8. Three initiatives that would amend the California Constitution to bar same-sex marriage have been submitted to the Attorney General's Office for preparation of titles and summaries prior to the commencement of signature gathering. (See Attorney General's website list of active initiative measures, available at <http://caag.state.ca.us/initiatives/activeindex.htm>.)

9. A bill that would have legalized same-sex marriage, failed to pass the Assembly on June 2, 2005. (Assembly Bill 19 (2005-2006 Reg. Sess.), Bill History, available at <http://www.leginfo.ca.gov/bilinfo.html> [as of June 29, 2005].) Two other bills that would amend the constitution to prohibit same-sex marriage have failed to pass out of legislative committees. (Assembly Constitutional Amendment 3 (2005-2006 Reg. Sess.); Senate Constitutional Amendment 1 (2005-2006 Reg. Sess.), Bill Histories available at <http://www.leginfo.ca.gov/bilinfo.html> [as of June 29, 2005].)

Those same couples, and other same-sex couples who may wish to be married in California, now face a different form of limbo. They have been told by the trial court that the statutes that prevent them from marrying are unconstitutional, and yet they face a substantial delay before knowing whether the trial court's judgment will stand. And it almost goes without saying that many other Californians, including the local officials who administer the marriage laws in the 58 counties, have a desire to have this issue expeditiously resolved.

Given this need for expedited review and the reality that the same-sex marriage issue is important enough that it would likely be ultimately decided by this Court after a decision by the Court of Appeal, the State Appellants respectfully request that the appeals in *CCSF*, *Woo*, *Tyler* and *Clinton* be transferred from the Court of Appeal to this Court.<sup>10/</sup>

## II.

### **THE MARRIAGE CASES SHOULD ALSO BE TRANSFERRED TO THIS COURT BECAUSE THERE IS CURRENTLY A CONFLICT AMONG THE COURTS OF APPEAL REGARDING THE SCOPE OF FAMILY CODE SECTION 308.5.**

The appeals should also be transferred from the Court of Appeal to this Court because the Courts of Appeal have recently issued different rulings on the scope of Proposition 22, codified as section 308.5 of the Family Code.

In *Armijo v. Miles* (2005) 127 Cal.App.4th 1405, *pet. for review*

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10. The State Appellants take no position on whether the *Thomasson* and *Fund* appeals should also be transferred to this Court.

*denied* S133795 (June 15, 2005), the domestic partner of a decedent who died in 2001 sued a doctor and two health care providers for wrongful death. (*Id.*, at p. 1409.) The trial court sustained a demurrer to plaintiff's complaint on the ground that the plaintiff lacked standing under the version of the wrongful death statute that was operative in 2002 because the plaintiff and the decedent had not registered as domestic partners with the Secretary of State. (*Ibid.*) The Court of Appeal for the Second Appellate District reversed, holding that the plaintiff had standing to bring her claim due to an amendment to the wrongful death statute by Assembly Bill 2580 (2003-2004 Reg. Sess.) ("AB 2580") that took effect on January 1, 2005. (*Ibid.*) In reaching this conclusion, the Court of Appeal also addressed an argument by the health care providers that AB 2580 violated Proposition 22 because it gave rights to same-sex couples that Proposition 22 limited to opposite-sex married couples. (*Id.*, at p. 1422.) The Court of Appeal rejected this argument, stating that the amendment of the wrongful death statute "has nothing at all to do with marriage." (*Id.*, at p. 1424.)

Before reaching this conclusion, the *Armijo* court also stated that it believed that Proposition 22 was intended to apply to same-sex marriages entered into in other states and in foreign countries. (*Ibid.*) The court stated that Proposition 22 "was designed to prevent same-sex couples who could marry validly in other countries or who in the future could marry validly in other states from coming to California and claiming, in reliance on Family Code section 308, that their marriages must be recognized as valid marriages." (*Ibid.*) Based on the court's ultimate conclusion that AB 2580 did not overturn Proposition 22 because "[n]othing in AB 2580 validates

same-sex marriages in California,”<sup>11/</sup> the Second District’s statement about the voters’ intent in enacting Proposition 22 appears to be dicta.

Shortly after *Armijo*, the Court of Appeal for the Third Appellate District issued its opinion in *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, *pet. for review denied* S133961 (June 29, 2005).<sup>12/</sup> In *Knight*, the petitioner claimed that Assembly Bill 205 (2003-2004 Reg. Sess.) (“AB 205”), the Domestic Partner Rights and Responsibility Act of 2003, effectively amended Proposition 22 without obtaining the approval of the voters under Article II, section 10, subdivision (c) of the California Constitution. (*Id.*, at pp. 17-18.) In rejecting the petitioner’s argument, the Third Appellate District stated that the plain language of Proposition 22 “ensures that California will not legitimize or recognize same-sex marriages from other jurisdictions, as it otherwise would be required to do pursuant to section 308, and that California will not permit same-sex partners to validly marry within the state.” (*Id.*, at pp. 23-24 (emphasis added).) Thus, the Third District viewed Proposition 22 as barring recognition of marriages wherever they are entered into while the Second District took the position that Proposition 22 bars only California recognition of out-of-state marriages.

The trial court’s decision in the coordinated *Marriage Cases*, issued only a few weeks after *Armijo* and *Knight*, did not cite either Court

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11. *Armijo v. Miles*, *supra*, 127 Cal.App.4th at p. 1424.

12. The Attorney General has filed an answer opposing the petition for review in *Knight*.

of Appeal decision. The trial court stated that “the background materials to Proposition 22 indicate that its purpose as articulated to the voters was to preclude recognition in California of same-sex marriages consummated outside of this state.”<sup>13/</sup> (Exh. 1 (Final Decision), p. 11.) Thus, the trial court appeared to take a position more akin to the view expressed in *Armijo* than the view in *Knight*.

This split among the courts regarding the scope of Proposition 22 provides an additional reason for this Court’s review of the *Marriage Cases*: the need to secure uniformity of decision among the lower courts. (Cal. Rules of Court, rule 28(b)(1).) It provides a further ground for this Court to transfer the pending appeals to itself for review.

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13. The trial court made this statement in the context of a determination that the legislative history of Family Code sections 300 and 308.5 did not establish a rational basis for the statutes. (Exh. 1 (Final Decision) at p. 10-12.)

## CONCLUSION

For the foregoing reasons, the State Appellants respectfully request that this Court transfer to itself the appeals of the judgments in *CCSF*, *Woo*, *Tyler* and *Clinton* now pending before the California Court of Appeal for the First Appellate District.

Dated: June 29, 2005

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**  
**[Pursuant to California Rules of Court, Rule 14c1]**

Pursuant to California Rules of Court, Rule 14c1, the attached  
Petition to Transfer Appeals is proportionately spaced, has 10.5 or fewer  
characters per inch, and was prepared in 14 point font in New Times Roman  
and contains 4,137 words.

Dated: June 29, 2005

Respectfully submitted,

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